JD–86–04
Grand Rapids, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PAULSTRA CRC CORPORATION

and Case 7–CA–47365

LOCAL 49L, UNITED STEELWORKERS
OF AMERICA, AFL-CIO, CLC

Kelly Temple, Esq., for the General Counsel
Peter Kok and Nathan Plantinga, Esqs.,
for the Respondent

DECISION

STATEMENT OF THE CASE

Jane Vandeventer, Administrative Law Judge. This case was tried on August 5, 2004, in Grand Rapids, Michigan. The complaint alleges Respondent violated Section 8(a)(5) of the Act by making unilateral changes in working conditions without notice to the Union or affording the Union an opportunity to bargain about the changes.[1] The Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, the parties made oral arguments, which I have considered. Subsequently, the parties filed briefs,[2] which I have read.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

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[1] At the trial herein, I granted the General Counsel's motion to sever Case 7-CA-47408 from the instant case, and further granted the General Counsel's motion to withdraw the complaint allegations related to that case. The severed case involved an information request, about which the parties reached a settlement prior to the opening of the trial.

[2] The General Counsel's brief was mistakenly mailed to the Atlanta Judges' Division office, and was therefore not timely received. Due to the fact that the transcript, which stated that all post-trial communications should be with the Washington Judges' office, may not have been in the hands of the General Counsel at the time of the mailing of the brief, and the fact that the brief was mailed on the day before the due date, I have accepted the brief as timely filed.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with offices and places of business in Grand Rapids, Michigan, and Ithaca, Michigan, where it is engaged in the stamping, finishing, and sale of automotive parts. During a representative one-year period, Respondent purchased and received at its Grand Rapids and Ithaca facilities goods and materials valued in excess of $50,000 directly from points outside the State of Michigan. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent operates manufacturing plants in Grand Rapids[3] and Ithaca,[4] Michigan. Both plants are represented by the Charging Party Union in two separate bargaining units, each of which is covered by a collective bargaining agreement. Respondent also operates a sales and marketing office in Farmington Hills, Michigan, and other facilities in Walker and Cadillac, Michigan. Only the Grand Rapids and Ithaca plants are involved in this case.

Respondent has a profit-sharing plan, which is reflected in both collective bargaining agreements. In addition, Respondent, in 1987, instituted a Savings Plan (called SP) for all employees in its entire operation, including the two bargaining units. The SP is essentially a 401(k) plan, and is not mentioned in the collective bargaining agreements. Under the SP, Respondent contributes a percentage of each employee's income to an investment account, called the base match or base contribution, which is contributed by Respondent regardless of whether the employee saves anything or not. This amount has been 2.5% of each employee's annual compensation for the years 1995 through 2002. Before 1995, the base match amount was less than 2.5%. For the calendar year 2003, Respondent reduced the base contribution amount to 1.25% of annual compensation. A second feature of the plan involves an employee's own savings from his or her wages. If the employee saves his or her own money, Respondent

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[3] The bargaining unit at the Grand Rapids plant was stipulated at trial to be that described in the collective bargaining agreement: "hourly-rated production operator [sic] of Paulstra CRC Corporation employed at 460 Fuller NE, Grand Rapids, Michigan, excluding skilled trades, supervisors, lead persons and all other non-production operator employees." The current collective bargaining agreement is effective by its terms from November 3, 2003, to November 3, 2006.

[4] The bargaining unit at the Ithaca plant was stipulated at trial to be that described in the collective bargaining agreement: "hourly-rated production operator [sic] of Paulstra CRC Corporation employed at 1300 S. County Farm Drive, Ithaca, Michigan, excluding skilled trades, Quality Technicians, Rep Technicians, supervisors, lead persons and all other non-production operator employees." The current collective bargaining agreement is effective by its terms from January 20, 2004, to March 1, 2007.

matches a portion of the amount the employee saves.[5] This matching contribution was not changed, and is not at issue in this case.

According to the testimony of the former President of Respondent, Yves Huet, Respondent has complete discretion in deciding the amount of the base contribution. The SP adoption agreement states that "the Employer will contribute an amount to be determined from year to year." According to Huet, the amount of the base contribution for a particular year cannot be changed after the end of that calendar year. According to the chief financial officer, Tom Popma, the actual deposit of the money into the employees' investment accounts is normally done during the first six months in the succeeding year. The 2003 base contribution was actually deposited into employee accounts on June 29, 2004.

2. The 2003 Base Match Contribution

According to Respondent's witnesses, during the latter part of 2002 and the first few months of 2003, Respondent's business was in some difficulty. The American automobile makers who are its primary customers demanded that Respondent cut its prices on the parts its sells to them. These price cuts were a condition of their continuing to purchase parts from Respondent. Respondent announced a program of cost-savings and productivity enhancements which it called "Spring." These included, among other things, planned installation of some robotic production equipment.

In addition, the management team, which is responsible for the budget was requested by Huet to find additional areas where costs could be cut. The cost-saving measures devised by management were dubbed the "Spring Extra Mile" or SEM program. Huet composed a "Message from the President" dated April 21, 2003, in which he outlined the cost-saving measures in the SEM program. There were six areas described: (1) The SP base amount would be cut in half; (2) medical insurance premiums paid by employees would be increased; (3) business travel economies were listed; (4) purchase contracts for raw materials and supplies were being renegotiated; (5) all purchases would have to be approved in advance, and cell phone use curtailed; and (6) some lay-offs of non-bargaining unit employees would be undertaken.

The full paragraph dealing with the SP reads as follows: "First, the annual base 401K contribution, which is paid entirely by Paulstra, will be reduced by 50%. To explain this further, the current base contribution is 2.5% of compensation. This would be cut in half (to 1.25% of compensation). This measure will be effective at year-end in 2003 and 2004 but could be reversed if we meet our budget without it. We have, however, decided to maintain the 50% company match on your personal contribution."

Respondent intended to, and did, distribute this letter to its salaried employees. According to Respondent's witnesses, the letter was also posted on bulletin boards at both the

[5] Respondent matches 50% of the employee's savings, up to a maximum of 3% of annual compensation (if the employee saves 6% of annual compensation). For purposes of clarity, I have consistently referred to the amount Respondent contributes to the SP regardless of an employee's savings as the "base contribution" in order to distinguish it from the amount Respondent contributes to match employees' savings. It should be noted that in the record, the base contribution is referred to in some documents and testimony as the "base match amount" as well as the "base contribution."

Grand Rapids and Ithaca facilities. All General Counsel's witnesses testified that they had never seen it posted.[6]

It is, however, undisputed that the April 21, 2003, letter was shown to Charging Party President Earnest Sallie and Charging Party Recording Secretary Rebecca Sallie in a meeting which took place in the latter part of April 2003. Both E. Sallie and R. Sallie stated that they read the letter, and that Huet talked to them about it. They both recalled that E. Sallie said that the medical insurance premium increase could not be put into place for bargaining unit employees until it was negotiated. Regular collective bargaining agreement negotiations were expected to, and did, take place in the autumn of 2003, approximately six months after this meeting. From the testimony of the two Union representatives, it appeared that E. Sallie's remark to the effect that the changes could not be put into place until they were negotiated with the Union may have referred to the cut in the SP base contribution as well. It was apparent that the medical insurance premium change and the decrease in the base contribution were the only two changes, of the six changes in the SEM, which applied directly to bargaining unit employees. The two Charging Party representatives did not request a copy of the letter at this meeting, nor was one offered to them.

The SEM and the president's letter announcing it were also discussed with the Union committee at the Ithaca plant, headed by Kerry Sanger, the Union president of the Ithaca unit, at the regular union management meeting in April 2003. Sanger remembered being informed at that meeting that Respondent "may have to" make changes in the base contribution to the SP. Like the Sallies, Sanger did not request, and was not given, a copy of the April 21, 2003, letter.

Two Respondent witnesses, Walter Jenkins, Vice President for Operations, and Huet, testified that the cost-saving measures dubbed SEM were also discussed, one-by-one, at the regular monthly union-management meeting, which took place on April 29, 2003, in Grand Rapids. Huet's and another manager's exceedingly terse notes of the meeting support this testimony. None of the General Counsel's witnesses recalled any discussion of the cut in the SP base contribution amount at the monthly meeting. According to their testimony, they were very focused on discussing the robotic production devices, which were going to be introduced in order to enhance productivity, and all recalled that this topic was discussed at length. Respondent's witnesses' testimony and documentary evidence that the reduction in the base contribution was discussed with the Union at this meeting was not contradicted. A failure of recollection does not constitute a contradiction. I find that the evidence showing that the reduction in the base contribution was communicated to the Union at this meeting is uncontradicted.

During collective bargaining for the Ithaca plant initial contract, which lasted from June 2003 through January 2004, and bargaining for the successor contract in Grand Rapids, which took place in the autumn of 2003, the only proposal which dealt in any way with the SP was a proposal by the Union to increase the Respondent's contribution which matches the employees' personal savings. Respondent rejected the proposal, and the Union withdrew it. Neither side made any proposal dealing with the Respondent's base contribution to the plan, the subject matter at issue here. The collective bargaining agreements which were negotiated in the autumn of 2003 and January 2004 for the two bargaining units do not include a description of the SP.

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[6] The fact that none of the witnesses called by the General Counsel saw the letter posted does not specifically contravene the testimony of Respondent's witnesses to the effect that they had posted the letter on the bulletin boards.

On March 17, 2004, an employee brought to E. Sallie a letter he had found on the floor of the Grand Rapids plant. The letter was dated February 20, 2004, and was signed by Andre Janin, who had taken Yves Huet's place as president of Respondent in late 2003 or early 2004. The letter announced that due to the fact that Respondent did not meet its target profitability in 2003, there would be no profit-sharing payment for the year. In addition, it stated: "As announced last April, we enacted a very strict cost reduction program (called SPRING EXTRA MILE) in order to help offset the tremendous pressure on our bottom line. As part of this program, we reduced (by ½) the annual base match paid by the company at the end of each year to your 401K."

The Union filed a grievance and later an unfair labor practice charge.

3. Positions of the Parties

The General Counsel contends that the subject matter of the change was retirement compensation of unit employees, and was thus a mandatory subject of bargaining. The General Counsel also contends that although the Union received notice of the contemplated cut in the retirement contribution, the notice was inadequate, as it had not been put in place. The General Counsel further contends that the Union did not receive notice that Respondent had actually cut the base contribution to 1.25% until March 17, 2004, when the Janin letter came into its hands. In arguing that the notice was not adequate, the General Counsel relies on ***Postal Service Marina Center***, 271 NLRB 397, 400 (1984), a case which held that for purposes of Section 10(b) of the Act, the notice of an employer's unequivocal intention to take an action, even if the action is not yet completed, is sufficient to start the running of the six month period within which a charge must be filed. The General Counsel argues that the notice in the instant case was not "unequivocal," and that hence it was not sufficiently clear notice to constitute a "waiver of the Union's interest in bargaining. No mention is made in the General Counsel's argument of the Union's obligation to request bargaining. At the same time, the General Counsel argues that Respondent's announcement of the change in the base contribution was a "fait accompli," hence was so definite as to be impossible to change.

Respondent argues that the base contribution amount of the SP is not a mandatory subject because it is, by its terms, discretionary with Respondent. It further argues that by past practice, the Union has ceded its right to bargain over the amount of the base contribution, since the Union has never requested to bargain about the determination of the base contribution in over fifteen years of the program's existence. Furthermore, Respondent argues that the written SP plan, and the collective bargaining agreement form written documents which, by virtue of a zipper clause in the contract and the parol evidence rule, mandate a finding that the Union has waived its right to negotiate over the amount of the base contribution to the SP.

Even if Respondent had a duty to bargain over the base contribution amount, Respondent contends its notice to the Union, in the April 2003 meetings, to the effect that the base contribution had been decided to be cut in half was sufficient notice to the Union to trigger its obligation to request bargaining about the issue. Respondent notes the only ambiguity in its notice of the base contribution cut was the statement in Huet's SEM letter that if Respondent's business performance improved, the base contribution could be restored to its previous level. Respondent also notes the fact that the Union raised a different aspect of the SP in one of its 2003 bargaining proposals indicates that the Union could and did make proposals about the SP.

B. Discussion and Analysis

It is axiomatic Board law that "wages, hours, and working conditions" are mandatory subjects of bargaining, and must be discussed between an employer and a union who are in a collective bargaining relationship. The term "wages" has been construed broadly to cover all types of compensation to employees, including retirement plans such as, for example, pension plans, profit-sharing plans, stock purchase plans, and 401(k) plans. See, e.g, ***Convergence Communications***, 339 NLRB No. 56 (2003); ***Wild Oats Markets***, 339 NLRB No. 15, sl. op. at 11 (2003); ***Paul Mueller Co***., 335 NLRB, 808, 809 (2001); ***Lexus of Concord, Inc.***, 330 NLRB 1409, 1414 (2000).

Thus, Respondent's first contention, to the effect that it has no duty to bargain over the SP because it was unilaterally implemented in the first place, covers all the Respondent's employees, is not included in the collective bargaining agreement, and has not normally been the subject of bargaining between the parties, is rejected. The fact that the SP plan is embodied in a separate document does not remove it from the scope of bargaining. ***Midwest Power Systems***, 335 NLRB 237, 238 (2001). The contributions to the SP are a part of employees' compensation, and are thus mandatory subjects of bargaining.

Respondent's contentions of waiver of the bargaining right by past practice are likewise not persuasive. The fact that the Union has not requested bargaining over other changes to the plan in the past does not by itself waive the Union's right to bargain over the subject. The Board will not imply a waiver of a bargaining right absent clear and convincing evidence. Mere disuse of a right does not establish such a waiver. See, e.g., ***Mississippi Power Co***., 332 NLRB 530, 532 (2000). In that case, unilateral changes in a plan for future retirees were unlawful even where the union had not requested bargaining over such changes in the past.

Therefore, an employer may not make changes to these plans without giving the bargaining representative adequate notice of the planned changes, in a sufficiently timely fashion to allow the union to bargain over the changes and their effects. If an employer does give the union sufficient notice to permit bargaining over the proposed change, but the union does not request any bargaining, the employer has satisfied its obligations under the Act, and no violation will be found. In ***Associated Milk Producers***, 300 NLRB 561, 563 (1990), the employer notified the union that it would be stopping its contribution to the pension program. The union failed to request bargaining over the issue, although it filed a charge. The Board held that no violation of Section 8(a)(5) had occurred. The notice to the union was sufficient, but the union did not take advantage of the notice by requesting to bargain about the subject. The Board has frequently held that a protest, a grievance, or the filing of a charge are not tantamount to a request to bargain.

The last-named case is directly on point here. That ***some*** notice was given to the Union is not disputed. Respondent first notified the Union in April 2003 that the base contribution "will be reduced by 50%" for 2003 and 2004, and that the change would be effective at the end of 2003. Respondent further said that it hoped business would improve sufficiently to permit a change back to the former higher contribution. Thus, the Union had approximately eight months in which to request bargaining about the announced reduction in the base contribution before it took effect. It did not do so. Even during collective bargaining for a new collective bargaining agreement, which occurred during as many as seven of those months, the Union did not raise the issue with respect to either bargaining unit. In the absence of any request to bargain by the Union, the Union must be deemed to have acquiesced in the announced change, and hence the change in the base contribution, which Respondent put into effect at the end of 2003, was entirely lawful.

The General Counsel's contention that the notice was not sufficient because it was not definite is rejected. The language of the letter, which was shown to the Union states that the change ***will be*** made at the end of 2003. This language indicates that unless something happens to change the Respondent's plans, the change will occur. In any case, even if the change were couched in less definite language, it would still be sufficient to put the Union on notice that it needed to request bargaining about the subject. The General Counsel's argument is that the notice was insufficiently clear to trigger a "waiver" of the Union's right to bargain. That is not the issue. The issue is whether the notice was sufficiently clear to *trigger the Union's obligation to request bargaining.* The case cited by the General Counsel on this point deals with an entirely different issue, i.e., what is sufficient notice to start the Section 10(b) period of limitations. The type of notice necessary to put a bargaining representative on notice that the Employer is contemplating a change in wages, hours, or working conditions may well be different from that which would start the limitations period, depending upon the facts of the particular situation. I find that in this situation, the notice of a proposed change in the base contribution was not only clear, but was given well in advance of the date set for the change to take effect. I further find that there is no evidence in the record that the Union ever, during May through December 2003, requested bargaining about the announced change in the base contribution. By failing to make such a request, the Union essentially acquiesced in the announced change.

The General Counsel's contradictory argument that the notice of the change in the base contribution was a "fait accompli" at the time it was announced is likewise rejected. The testimony and the documentary evidence show that the change was not set in stone and could be changed if economic conditions improved. In addition, there were eight months before the effective date of the change, providing plenty of time for the Union and Respondent to bargain about the announced change.

In summary, I find that Respondent gave the Union sufficient notice of its intention to decrease the base contribution to the Savings Plan for 2003 and 2004. The notice was timely, as it was given more than eight months before the change took effect. The Union did not request bargaining about the decrease in the base contribution. I find, therefore, that Respondent did not violate Section 8(a)(5) of the Act, as alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The case is dismissed in its entirety.

Dated, Washington, D.C., September 3, 2004.

Jane Vandeventer
Administrative Law Judge